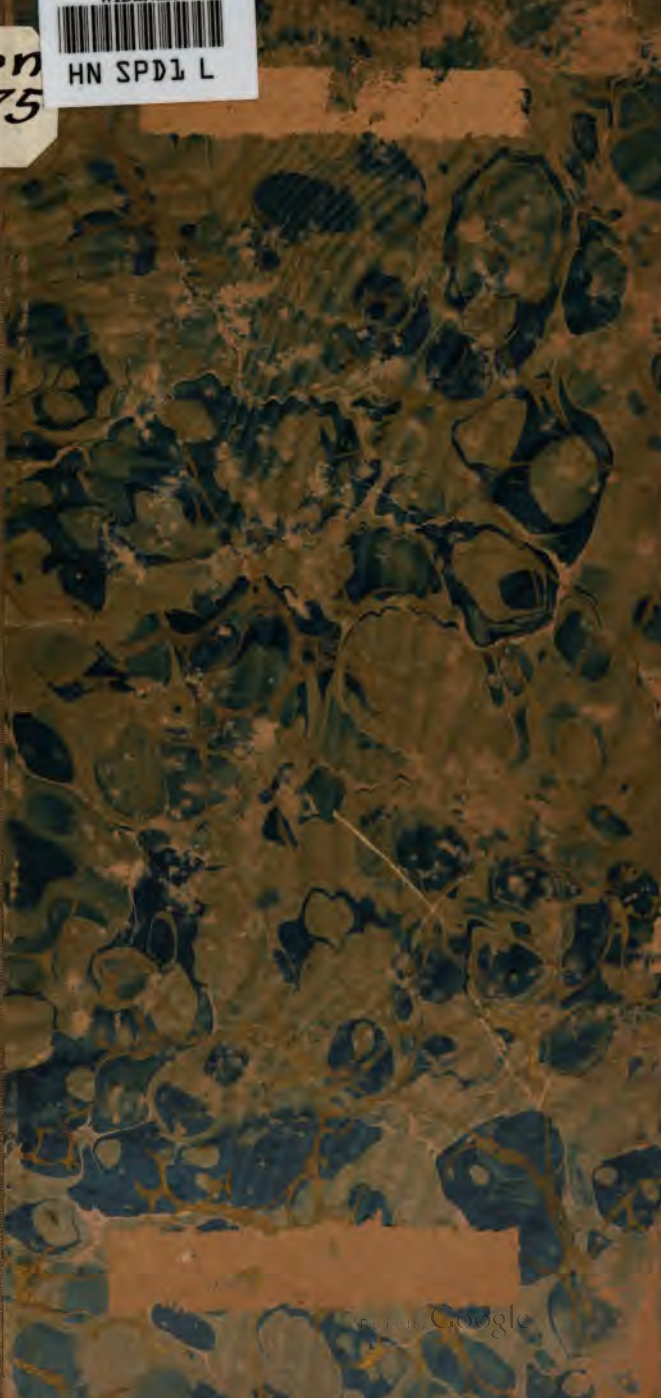

Ovid, A. L. 1550.

Cuer

A

BRIEF INQUIRY

INTO

the origin and nature

THE ORIGIN AND NATURE OF CORPORATE PRIVILEGES,

AND

INDIVIDUAL RESPONSIBILITIES OF THE MEMBERS OF TRADING CORPORATIONS AT COMMON LAW.

BY

Alexander

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CINCINNATI:

LAWYER AND DUMAS PRS., N. W. CORNER MAIN AND FIFTH.

1850.

However natural and proper it may be as a general rule, that both rights and property should descend from parent to child, there are cases in which it is highly expedient, (if not absolutely necessary,) that they should not so descend; but should pass from one to another, according to some artificial form, as might best promote the particular objects desired. As, for example, when a State is divided into various political districts—the inhabitants of each district having peculiar local rights and duties, for the enjoyment of which it is necessary to have a common property, it is evident that neither such rights, or such property should descend from parent to child; but should pass from one to another, as they may lose or acquire a residence in such political division of the country. The common law, being founded in reason, has ever made exceptions to its general rule of descent, in favor of such rights and property, permitting them to pass from one person to another, as might best promote the particular objects desired. To accomplish these objects most effectually, it is often necessary to make contracts concerning the common property; upon which contracts there would naturally arise various disputes which must be settled in courts of justice. In such cases the common law did not generally require the persons interested either to hold property, or defend, or appear in court under their individual names, nor to convey in such names, each individual affixing his signature and seal to the deed. But it permitted them to hold, defend, and appear in some common name, (usually a general description of the persons interested.) They might, also, convey by, and authenticate with a common seal.—The necessity for such exceptions to the general rule of law, will be apparent to all who examine one of the political divisions of the country; for instance, Counties which are established for the purposes of government. To accomplish these purposes they must have Court Houses,

Jails, &c. It is manifest that such property should not pass from parent to child; but an interest in it should pass from one to another, as they might lose or acquire an interest in the particular government. The property is held as incident to government; that is, it is a means necessary to accomplish the ends of government. An interest in the means should be acquired or lost by acquiring or losing an interest in the ends to be accomplished. The interest in government is acquired or lost not by deed, but by being subject to its laws. Therefore, the interest in such property, which is the incident, or means, is not acquired by deed, but by acquiring an interest in the government, which is the end. When such property was in litigation, the common law did not require each individual interested to appear under their several names, as it would be difficult to prosecute a suit in this manner, when all the inhabitants of a country were interested. Some common name would describe the person in interest as well, or better than it could be done by endeavoring to set forth the name of each individual. In describing them by a common or general name, many difficultie would be avoided; such as misnomer, non-joinder, &c. Nor should such property be conveyed by deeds executed and authenticated by the signature and seal of each individual in interest; as that would be both unnecessary and impracticable. Nor should such property be held in the several names of all the inhabitants; as that would produce confusion and uncertainty. For such, and the like reasons, the common law has ever, contrary to its general rules, permitted such interests to be held, conveyed, and defended in a common name. When a company of persons held, conveyed, and appeared in court, concerning a common property, under a common name, the judges had no official means of knowing each particular individual appearing under that name; but they knew them only as a class, or company of persons, maintaining a common right, under a special name. Hence such classes or bodies of persons were called corporations; or, in the more exact and precise language of common law pleadings, "corpus corporatum," (a body of bodies, or persons.) For the same

reason any particular changes which might take place, with reference to the persons using the special name, would not be noticed by the courts. Hence such bodies, in contemplation of law, have neither predecessors, or successors; though the particular members may have both. Upon the same principal lands held and managed in a common name, are said never to descend; though individuals may acquire an interest in such property, by becoming a member of the company having the right to use the name; which in legal phrase is called taking by succession.

Municipal or political corporations have existed from the earliest periods of civilization; and, if we may credit history, they exerted a powerful influence in establishing the liberties, and civilizing our English ancestors. They are, perhaps, the earliest instances in which the privileges were enjoyed of holding joint property in a common name, having their foundations in the common law itself. When lawyers wished to distinguish companies of persons exercising such privileges without charter, from companies exercising them under charter, they called one "qua corporations," the others simply corporations: the one exercising their privileges by virtue of the common law, independent of speeial grant; the others deriving their privileges from special grant.

When Christianity was introduced, and with it learning and charity, to promote which it was found necessary to have churches, colleges, hospitals, &c., it became necessary to have property set apart to these purposes. In order that this property might continue to be applied to the purposes for which it was designed, it should not descend to heirs according to the general rule of law; but like property belonging to government, being a means necessary to an end, it should follow as an incident to that end. Take, for instance, a church; if this property was to descend from parent to child, there would be constant danger of its being perverted from its proper objects; to prevent which, it would be necessary to make frequent hazardous and perplexing conveyances from one person to another. Property belonging to churches, colleges,

&c., like property belonging to government, should not be held, conveyed, or defended in the individual names of the persons interested; but in a common name. For if contracts concerning such property, were to be executed by each person in interest, signing and sealing separately, it would be almost impossible to make and execute a valid contract. If each person in interest were required to appear in court, under their respective names, it would be difficult to get the proper parties before the court; and when there, the cause would be subject to continual delays, caused by the number and variety of the parties on the record. If held in the individual names, it should be defended and conveyed in the same names; otherwise there would be uncertainty and confusion. For these, and similar reasons, it was found expedient to make exceptions to the general law of descents; and, also, to the general method of holding, conveying, and defending, in favor of churches, colleges, hospitals, &c. How were such exceptions to be made? To get Parliament to pass a private act, upon each and every occasion, would be far too expensive. To get them to pass a general law, permitting every person who might wish to promote such objects, to exempt an or all of his property from the general rules of law, ..ld have been contrary to the feodal policy, which th n prevailed: consequently, relief from Parliament must be limited in its application.*

The king, by virtue of his prerogative, may best accomplish the objects desired. He, with the assent of the immediate lord of the fee, might, in accordance with the feodal policy, permit a company of persons to

* Note.—Previous to the American Revolution, the King of Great Britain created corporations in this country. Whatever were the privileges and responsibilities of corporators at that time under the common law, would continue the same until the present day, unless altered by statute. I have, therefore, throughout, considered corporations as having such privileges only as the king might grant, at common law. This course has been pursued, lest some persons might confound the power of creating corporations, with what is properly legislative power.

hold land in a common name, as they alone could take advantage of such holding. The king, also, by virtue of his being the fountain of justice, might, when such lands came in question, issue his original writ, (or command,) describing the persons holding in a common name, by that name; which writ, the judges in those arbitrary times, would not abate on account of such general description; they holding their places (and too often their heads, also,) at the pleasure of the crown. Especially would this be the case, since the writ was issued in this form merely to facilitate justice, and is analagous to writs issued against political divisions of the country. The judges, therefore, would determine the right under such writs. The privilege of holding lands, and suing out writs, in a common name, being discretionary with the king: he might grant them upon condition. He might say that upon certain contingencies, some of the persons, having the privilege of being described by this general name, should lose it, and others should take their places; that when a majority wished to use the name, for the promotion of the common object, the minority should submit; that a majority might affix the common seal to deeds made in the company's name, concerning the joint property, and when so affixed it should bind the company. If persons composing the company should accept the grant upon such conditions, they would be bound by the conditions. The joint property being held, conveyed, and defended in a fictitious name, like property belonging to the political divisions of the country, the interest in such property would pass in a similar manner from one to another, without making a direct conveyance of the property itself, merely by acquiring the privilege of using the name under which the property is held. By acquiring this privilege, they acquire a control over the joint property. Thus if the privilege of holding and conveying property in a common name, together with the privilege of appearing in court under such name, be granted to A B and C, and A's right to the joint use of the name be transferred to D; then B C and D, having the joint right to use the name, would have the legal control over the property held under that name.

Now if B C and D were to sue for rent due under the common name, the tenant could not plead the change that had taken place, with reference to the person represented by that name. He could not plead in abatement, because B C and D have a right, by the king's grant, to appear in such name; he could not plead it in bar, because B C and D are the real parties in interest,—A having transferred his interest to D; he could not demur, as the change of persons does not appear upon the record. Thus we may readily see an interest in the joint property may be conveyed, by transferring the right to use the common name. A good title to such lands might be made by conveying in the common name, and affixing the common seal to such deed, as none of the parties having an interest in such lands, could take advantage of such conveyance, without breaking the conditions of the grant permitting them to hold the lands in that manner, which they would not be permitted to do. Upon the death of one of the persons having this joint privilege, whoever might succeed to the joint right of using the name, succeeds to an interest in the joint property. The heir cannot claim such interest as heir; because joint property never descends to the heir. The other persons having the joint privilege cannot exclude such successor, without violating the conditions upon which the privileges were granted. The king, by granting such privileges upon these conditions, enables a company of persons to manage and dispose of their joint property as a body. New members may be introduced into the body; they succeeding to a joint interest in the property with the old members, without directly conveying the property itself. Consequently the property so held, may constantly be applied to a particular purpose, without either the hazards of perpetual conveyances, or the danger of having it perverted from its object, by heirs. By managing the property as a body of persons, they avoid many difficulties which would arise if managed in any other way. We have already shown that a company of persons holding and managing property in this manner, were called "corporations," or "corpus corporatum;" because they,

conducting their business as a body, were known to the courts as such. That these are the sources from whence corporate privileges were derived is evident from the following considerations.

The power to hold, to have, to grant, to receive, to sue and be sued, in a common name, to transmit property in succession, to make by-laws, and to evidence contracts made in the common name, by a common seal, are the only powers necessary to a complete corportiaon. (1) When persons have such privileges, they not only answer the various definitions given of a corporation, but they accomplish the objects for which, we are told, they are created. (2) "They are a collection of many individuals, united into one body, under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law, with a capacity of acting, in several respects as an individual, particularly of taking and granting property, contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its constitution."(3) Having perpetual succession, they enjoy a kind of political immortality, by means of which a succession of individuals may take property, without the perplexing intricacies, or hazardous and endless necessity of perpetual conveyances, for the purpose of transmitting it from hand to hand. They may constantly act for the promotion of a particular object, like an immortal being. These are the chief objects for which corporations were created.(4) If the power to create corporations were derived from the source we have supposed, we can readily explain why the Barons, having courts, and issuing original writs had power to create corporations at common law; why the king creates copporations in counties Palatine, not as king, but as lord of the county; he issuing such letters patent,

(1) Thomas vs. Dakin, 22 Wend. Rep. 14. Warner vs. Bears, 23 Wend. Rep. 103.

(2) Dartmouth College vs. Woodward, 4 Wheaton, 636. Providence Bank vs. Billings, 4 Peters' Rep. 562.

(3) 1 Kyd on Corporations, 13.

(4) 1 Blackstone Commentaries, 467. 4 Peters' Rep. 562.

under the county seal and not under the great seal of England; except when the right of lord is annexed to the crown, in which case, he may issue the letters patent, either under the county seal, or the great seal. Why, under the statute of Ann, informations in the nature of "quo warranto" may be brought before the courts of session of counties Palatine. (5) If corporations are created in this manner, to enable persons to devote their property perpetually to some laudable object, and to facilitate justice, we can easily account for the readiness with which judges have seized upon slight circumstances to presume corporations; why the king's grant of lands to a corporation by another name than the one by which they were previously known, should pass the lands, and the letters patent should be unto them a new corporation. (6) Why a grant of lands, or an advowson to the senior fellow of a college, or a grant of lands to a Hundred, rendering rent, or a grant to hold a mercantile meeting, have all been construed to create corporations. (7) Why it has been held, that when persons are in the exercise of corporate privileges, they cannot be questioned as to such privileges, except by the king; (8) presumptions that cannot be accounted for in any other way.

For a long time these privileges were confined to political communities, or communities organized and endowed with property, for the promotion of religion, learning, and charity. But when commerce began to increase in extent and importance, it was discovered that a large and concentrated capital would have great advantages. Accordingly persons engaged in such pursuits became anxious to unite and concentrate their means. This they could not so effectually accomplish under the general method of holding, conveying, and defending property, as they could

(5) 1 Kyd 42, Angell & Ames, on Corporations. Wilcox Mun. Corporations, 2, 4.

(6) Wilcox on Mun. Corporations 460, 461.

(7) 1 Ves. Sec 473. Dyer's Rep. 100. Supported by 2 T. R. 672 Sutton's Hospital, 10 Coke, 27; 2 John. Ch. Rep. 325.

(8) Angell & Ames, on Corporations, 664, and authorities cited; ibid 507, and authorities cited.

if they had the privileges enjoyed by corporations Consequently, many mere trading companies applied to the crown for these privileges, which were granted upon such conditions as were thought most completely to accomplish the objects desired; as, for example, that a certain proportion of the grantees might make rules for the management of the joint property; that the privileges thus granted should pass from one person to another, upon certain contingencies, &c. As the advantages of such privileges became more and more apparent, the number of mere trading companies, which sought these privileges, increased, until they have spread themselves over every section of our country, entering into every branch of business. As long as these companies or corporations had sufficient joint property to answer company debts, the question whether the individual members were, or were not responsible for these debts, would not arise. But when through mismanagement, or fraud, they began to fail, this would, very naturally, become a question of great importance. This is the important question presented for our present consideration. And here, in the outset, permit me to remark, that, upon principle, I can see nothing in the origin of corporations, or in the nature of the privileges conferred upon them, which should, or does exempt the individual stockholders, in their private capacity, from liability to the corporate debts. All the powers necessary to constitute a corporation, may as well be exercised without as with this exemption. If it has an existence in our law, it does not grow out of the express or implied powers conferred upon the corporators, but its origin must be accounted for in some other way.

The first and only instance that I have been able to find where this question came directly before a court of law, is to be found in Spear vs. Grant, 16 Mass. R., 9. The facts of that case were, substantially, as follows: The stockholders of the Hallowell & Augusta Bank divided seventy-five per cent. of the capital stock, among themselves, (the bank at the time being indebted upon bills previously issued.) When this division was made, it was thought by the stockholders that the twenty-

five per cent. of the capital stock remaining, together with the securities of the company, would be sufficient to meet all demands against them. But the President, and one of the directors, who were largely indebted to the Bank, (which debts were not secured according to the laws of the company,) failing, the portion of the capital stock remaining, was not sufficient to meet the company liabilities. Spear, the plaintiff, coming into possession of some of the bills issued by the Bank, brought an action on the case, against Grant, one of the stockholders, who had received a larger sum upon the division of the stock, than the plaintiff claimed. It was held by the court that the plaintiff could not recover. Chief Justice Parker, in delivering the opinion of the court, says, "each of the individual stockholders is not liable to each of the creditors. First, because the note is evidence of an express promise to the bona fide holder, and cannot be made the basis of an implied promise of the stockholders indidually; that it came under the statute of frauds and perjuries, as most clearly the debt was not originally the debt of the individual stockholder, but of the company: and that if any engagement existed against the defendant, or the other stockholders, it must have been collateral, and so within the principles that had been applied in the construction and application of the statute just mentioned. But he referred to other less technical difficulties, which he deemed insuperable. "If promises," said he, "can be supposed to have been made by the defendant, or created by law, what party is the promisor? Can it be that each stockholder has promised each holder of the notes, to pay his demand, if the bank should become unable or unwilling? This would be to encounter a hazard, limited only by the amount of the whole number of the notes which the bank may issue. This certainly cannot be imagined to be the nature of the liability. Shall the responsibility be limited to the amount of interest which the stockholder has in the bank? If so, which creditor shall have it? He who is the sharpest and has made the first demand? Or he who has been more modest and perhaps more meritorious? Shall the original holder, who paid to the bank

be indemnified? Or he, also, who, when the credit of the bank was run down, may have bought the notes for a trifle? These questions it would certainly be very difficult to settle, if the stockholder was liable to the amount to his share of the stock only; and if he were equally liable to each holder of the notes, (which he must be, if he be liable at all; for if the facts agreed create a promise of one, they create a promise to all,) then the most palpable injustice would take place. For a stockholder, wholly innocent and ignorant of the mismanagement which has brought the bank into discredit, might be ruined by reason of owning a single share in the stock of the corporation. There is no view of the subject in which we can give effect to the claim of the plaintiff." It would follow from the positions taken by the court in this case, that the stockholders in a bank, (they *having* no individual responsibility,) may divide the *capital* stock amongst themselves, without paying its debts; and the common law will furnish no remedy against such a proceeding. No one will pretend to uphold this as justice. Is it law? If it is, then justice and law can no longer be considered as synonimous terms. For my part I am unwilling to admit any such conclusion, unless it can be sustained, either by a long train of decisions, or by reason and the analogies of law. The court cites no authority in support of their position, simply, as we presume, because there was no such authority. It is true there are a few undigested expressions in text writers, and some dicta, which say corporators cannot be made individually liable, at common law, for the debts of the corporation. But these, it is conceived, are not sufficient to establish so extraordinary a position, unless they are well supported by reason and analogy. The technical objections taken to this action by the court, are founded upon the supposition that the company is something entirely separate and distinct from the persons who compose it; so that a promise made by the company is not a promise made by its members. To suppose, as is done in this case, that a number of persons can, by contracting with the king, organize themselves into an artificial being, independent of themselves;

so that the acts of the company are not the acts of the members composing the company; that this being, founded in contract, having neither the power of acting, nor the capacity of enjoying any mental or physical pleasure, aside from the acting and enjoyment of the members; that a being, thus constituted, could both give and receive a valuable consideration, without the members either giving or receiving, are fictions so extravagant and absurd, that it might seem almost needless to answer them. It is true both text writers and judges have been in the constant habit of calling corporations artificial beings. But it is evident that they did not mean to say a corporation was something entirely distinct from the members composing it. All they meant by such expressions was, that a number of persons might collectively transact their joint business under a common name; and that when so transacting their joint business, the court, for beneficial purposes, would take notice of them as a class or body of persons using a common name. Thus, Lord Bacon says, "a corporation is an artificial body of men, composed of divers constituent members, 'ad instar corporis humani,' the ligaments of which body politic, or artificial body, are the franchises and liberties thereof; which bind and unite all the members together, in which the whole frame and essence of the corporation consists." (9) Here it is evident all that is meant by the term "artificial body," is, that a corporation is a number of persons having joint rights, held under a common name, which they might collectively use and defend in a common name; and when so acting, the court would take notice of them as a collection, or body of persons. In what other sense could their "franchises and liberties" be the ligaments of their union; the bonds whereby many persons are united into one body, "in which the whole frame and essence of a corporation consists." Again it is said, "a corporation must have a name; it is the knot of its combination, the very being of its constitution, without which, it is nobody to sue, or be sued." If we understand a corporation to be something

(9) Bac. Abridg. Til. Corp. 437. 440,

separate and distinct from its members, this language is perfect jargon, perfectlly unintelligible. But if we understand a corporation to mean a collection of individuals, doing a joint business, under a common name, we can readily see how the joint rights "bind them together;" how the common name "is the knot of their combination;" the means whereby they are enabled to act collectively, "in which the whole frame and essence of a corporation consists." Blackstone calls a corporation an artificial being; but he was not so absurd as to suppose that a corporation was an artificial being so entirely distinct and separate from the persons composing that being, that the promise made by the corporation is not a promise made by the members composing the company; for he expressly says, the affixing the seal of the corporation unites the several assents of the individuals who compose it, and makes one joint assent of the whole. (10) Again, he says, "a fifth mode of gaining a property in chattels, is by succession; which is, in strictness of law, only applicable to corporations aggregate, in which one set of men, may, by succeeding another set, acquire a property in all the goods, moveables and other chattels of the corporation.' (11) If they, the men, have a property in such goods, they cannot be divested of that property without their consent. Consequently, whenever the property is sold, they, the men, (the corporators,) must consent, must contract, which most clearly proves that a contract made by a corporation, is a joint contract made by the members of the corporation, and not by some artificial being, separate and distinct from the members, as it is supposed by Chief Justice Parker. It has been decided that if a corporation have franchises, or privileges, by grant or prescription, and afterwards they are incorporated by a new name; as where a Prior and Convent before, and afterwards Dean and Chapter; although the quality and name of the corporation is altered and changed, dead persons in law being made secular, yet the new body will enjoy all the franchises, (12) privileges, and hereditaments, that the old body

(10) 1 Black. Com. 475. (11) 2 Black. Com. 430. (12) 4 Coke Rep. 87; (13) 2 Lev. 238.

politic possessed, which could not be the case if the property did not belong to the persons composing the body politic, but to an artificial being, distinct from them. Consequently, when ever such property is sold, the members must contract. Again, it has been held, that if a town is incorporated by one name, and afterwards receive a new charter, under another name, they may recover a debt contracted under the old name int the new name; (13) which is based upon the same supposition, namely, that the members are the real parties to the contract.

It has been remarked by Sir Robert Sawyer, that "the instrument of creation, and the forms of pleading the rights to be a corporation, do best explain its nature, (viz:) "Quod Homines et Inhabitantes, cives et Burgenses;" or such other general name, describing the persons who are to take "sint corpus corporaum refacto et nomine," (which was the English form.) And when prescription is made for a body politic, "Quod Homines et cives;" or, "Homines et Burgenses, sunt a tempore cujus &c., fuerunt unum corpus corporatum, re et facto per nomine." So that it is something more than a notion or mere name. "Corpus corporatum" fully expresseth it; a body made up of several visible bodies, "in unum collecta, et vincula juris unita." And a corporation is every whit as visible as an army; for though the commission, or authority, may not be seen by every one, yet the body, united by that authority, is seen by all but the blind; and if the king, or the law, demand the authority, it must be shown, and is as visible in the eye of the law as any other right, whereof natural persons are capable of. In Sir J. Bagg's case, it is allowed to be such a right, that any member separately considered, hath a freehold therein; and all jointly considered, hath an inheritance which may go in succession. Natural persons, as such, are capable of taking and holding this right. It is neither taken nor held in their politic capacity, but their natural, for many men, as men are capable of union; which is evident by the charters of creation, and the pleadings in all such cases. It is "Homines et Burgenses, Homines et cives," who are constituted "unum corpus corporatum." And as the

natural persons are an essential part constituting the body politic, so all the operations and exercise of this right, are only performed by the natural persons, 21 Ed., 4th fol., 14. That book and other authorities are express upon that point; though in a case so evident, there need be no authority. Therefore, where the question is for non use or abuse of franchises, by a corporation, it, must, of necessity, be introduced for some acts or negligence of the natural persons, or those officers that are employed by them, and the question will rest only upon this,—what acts, or what omissions of of the natural persons will affect this right, wherein all the members of the body have an interest." (14)

These remarks are perfectly applicable to corporations created at this day. All the rights, powers, and duties are given to, and performed by the individuals composing the corporation. Take, for instance, the creating clause of one of our modern bank charters: "Be it enacted, &c., That a bank shall be established at Columbus in the County of Franklin, and those who shall become stockholders in the said bank, in the manner hereinafter prescribed, their successors and assigns shall be, and hereby are created a body corporate and politic, by the name and style of the President, Directors, and Company of the Franklin Bank of Columbus, and shall so continue until the first day of January, which will be in the year of our Lord eighteen hundred and forty-three; and by that name shall be and are hereby made capable in law, to have, purchase, receive, possess, enjoy, and retain to them and their successors, all such lands, tenements and hereditaments as shall be requisite for their accommodation and convenience in the transaction of their business, and such as may be in good faith conveyed to them by way of security, or in satisfaction of debts previously contracted, in the course of their dealings as a bank, or purchased at sales on judgments obtained for such debts, and the same to sell, grant, rent, and dispose of, to sue and be sued, plead and be impleaded, answer and be answered, defend

(14) Sawyer's argument in *quo. war.* in the case of the king vs. city of London

and be defended in courts of record, or any other place whatever; and also, to make, have, and use a common seal; and the same to break, alter, and renew at their pleasure; and also to ordain, and establish, and put in execution such by-laws, ordinances, and regulations as shall seem necessary and convenient for the government of the said corporation not being contrary to the constitution and laws of the United States, or of this State; and generally to do and execute all, and singular, the acts, matters, and things, which to them it shall, or may appertain to do, subject nevertheless to the rules, regulations, restrictions, limitations, and provisions herein prescribed and declared." What can be plainer than that such an instrument will not create an artificial being distinct from the members? What better evidence can we have that a corporation is nothing more, nor less than a company of individuals, with the privilege of transacting their joint business under a common name? Every section, every sentence, negatives the extraordinary doctrine advanced in the case of Spear vs. Grant. All the rights and powers are given to the stockholders. They, under a common name, have, hold and possess such lands, tenements, and hereditaments as may be requisite for their convenience in the transaction of their business. Land is conveyed by them. They trade as a bank. They sue and are sued under a common name. They use a common seal, they have debts due to them; they make rules and regulations for the company. In short, they do all and singular the acts, matters, and things, which, to them, it shall or may appertain to do, subject, &c. There is not a single power or privilege given to it, an artificial being. The stockholders own every thing, and enjoy all the profits of the concern. Whenever the company makes a contract, the common seal is the evidence of a joint contract upon the part of the stockholders. Of those who contend that the contracts of the company are not the contracts of the members composing it, I would ask, why adopt so unreasonable a fiction? It is not necessary to the complete exercise of the powers conferred upon the corporators. They may possess and retain property un-

der a common name, may make company contracts, may sue in a common name, may use, break, and renew their common seal; and may transmit property in succession, as well without such fiction, as with it. And, lastly, they may make rules and regulations for the company; which rules and regulations will have the same force and effect without it, as with it; for in either case the force and effect of such rules and regulations depend upon contract, or the assent of the corporators. That the by-laws of a corporation are nothing more than a contract, entered into by the different members of the coproration, and the king, is evident from the following facts.

The general method of enforcing by-laws, is by penalty, for which assumpsit may be brought; (15) which could not be the case, if the by-law to be enforced, was not founded upon consent, or contract. Again, by-laws can bind none but members, obviously, because none but members have consented to them; the king having neither directly, or indirectly, the power of making rules or regulations concerning a subject's property, without his consent. (16) The authority derived from the king can give no right, or sanction to a by-law, beyond that of contract, the charter iself being nothing but a contract. (17) It is true a by-law may bind a member without his immediate assent to the particular law. But this does not prove a by-law not to be a contract; for each member, when he accepted the charter, agreed to the regulations contained in it, and he cannot revoke the powers then conferred, they being coupled with an interest. Again, by-laws may be presumed, from long and continual usage, and their repeal may be presumed from the same circumstances. (18) Now if a by-law is a contract, such presumptions may well be maintained. But if it is not, then they have not the least foundation. Not only is this fiction unnecessary to carry into effect the various privileges and objects of

(15) Angell & Ames on Corp. 304, and authorities cited

(16) 7 Barn. Cres. 838. Norris vs. Staps, Pob. 210.

(17) Dartmouth College case.

(18) Att. Gen. vs. Middleton, 2 Ves. Sen. 328. Berwick, upon Tweed, vs. Johnson, Lofft's Rep. 338.

a corporation, but there are no well settled cases which require any such support.

It is true a corporator, though a joint contractor, cannot release a joint debt, which joint contractors can generally do. But this is a mere exception to the general rule, and an exception which applies to joint contractors, not incorporated, as well as to those incorporated. Thus, if A and B make a joint contract with C, and it is agreed at the time, by all the parties to the contract, that A alone should release, B could not release, to the prejudice of A. (19) So in the case of corporators. They having certain persons appointed to make releases, and it being so understood by all parties, these persons alone have the right to release. For the same reason the admissions of members cannot be evidence against the company. A release is nothing but a written acknowledgment that the debt or obligation is satisfied; and if a written admission is not competent evidence, of course, a parol admission is not more competent.

It has sometimes been thought, that a corporation must be considered as a being separate and independent of the members to support the cases, where persons who have the control of the corporate name have sued a corporator. But it is conceived no such supposition is necessary. When a majority of the corporation bring suit in the corporate name, against any individual, the fact of the defendant's being, or not being a corporator, cannot appear without being specially pleaded; and if not specially set forth, it can afford no ground of objection. But if the courts will permit such fact to be specially set forth, they may, with equal propriety, permit the names of the actual parties to the contract to be set forth; for if they will go behind the corporate name and enquire who is and who is not a member; they may equally well go behind the name to enquire who are and who are not the actual parties to the contract. Thus, if A B and C were incorporated, and A and B, being a majority, should make a contract with C, in their corporate name, upon which

[19] 1 Tou. & Jer., 363. 1 Bos. & Pul. 447. 6 Mass. Rep. 322. 2 Camp 561. 6 M. & S. 156.

contract they should bring an action against C; it would be just as competent for A and B to show that the contract was actually made by A and B with C, and that, therefore, the corporate name, in this instance, did not represent C; as it would be for C to plead that he is a member of the corporation, and cannot be sued in such action, because he is represented by the name in which the suit is brought. If the courts will not take notice of the actual parties who make the contract, fraud and iniquity may be practiced with impunity. A and B being a majority of a corporation,, may sell corporate property, and if the courts will not take notice of the individual corporators who really act, A and B as a majority of the corporatron, may sell the property to A and B, as private individuals. Now if they should attempt to do this, would C, the other member of the corporation, have no remedy? If the corporation is an artificial being, independent of its members, then there is no remedy. The property belongs to an artificial being, not to A B and C; and that artificial being has regularly parted with it. C owned no portion of it; consequently he has no right to complain of such sale. Will courts of justice recognise such a transaction as a valid contract? Will they, for the sake of an unnecessary, foolish fiction, thus permit A and B to rob C? He who believes law has its foundation in truth and justice, will scarcely believe this is law. Yet the only way in which they can either recognise or relieve against such injustice, is by discarding this foolish fiction, and, (in the language of Chief Justice Marshall,) consider corporators as "a company of men transacting their joint business under a common name,"—and the real contractors.

In saying the corporate name is but a general description of the corporators, we are supported by the charters of their creation; which says, they, the stockholders, shall have the privilege of holding, suing, conveying and conducting their business in a common name. By the mode of pleading the right to be a corporation—by the proceedings in "quo warranto" for the breach of corporate privileges—by the manner in which mandamus is issued,

served, and enforced, in all of which cases, the corporate name is considered by the court, a general description of the corporators. When a mandamus is issued against a corporation, it goes in the corporate name, and is served upon the officers of the company; (20) if the corporation does not make a return to the writ, an attachment does not lie against an artificial, invisible, intangible being, called a corporation; but the court treats the individual corporators as the real parties, described in the writ by the common name; and accordingly issues a writ of attachment against them in their individual capacity. (21) Or, if a false return is made to the writ, the members are liable to an action on the case; (22) none of which proceedings would take place, if the common name was not a general description of the corporators—if they were not the real parties. We are also supported by the cases, which say corporators cannot be witnesses; (23) they being parties to actions brought in the common name. Also, by analogy from municipal corporations, where, upon judgment obtained against the corporation, each and every member is liable to execution, in his private estate. (24) If municipal corporations are merely a number of persons transacting a joint business under a common name, (as is manifest from the fact each member is liable in his private property, upon such judgment,) there is still greater reason for considering private corporations in the same light. There is nothing, either in the organization, or charters, which can make such a difference between municipal and private corporations, that the one shall be a company of persons individually liable; the other an artificial being, entirely separate and distinct from the members, so that a contract made by the company, is not a contract made by individuals composing the com-

(20) Rex vs. Exeter, 12 Mod. 251. Rex vs. Tregony, 8 Mod. 112. Rex vs. Borough of Plymouth, 1 Barnard 81. Rex vs. Cambridge, 4 Burr, 2011. Rex vs. Smith, 2 M. & S. 298.

(21) Mills case' T. Raymond. 152. Rex vs Rye, 2 Barr, 798.

(22) Com. Rep. 86. Rex vs Mayor of Reppon, 1 Lord Raymond, 564. Mayor of Hertford's case, 1 Solk. 192.

(23) 21 Maine Rep. 501. Jacobs vs. Fountain, 2 John. 178. Lufkin vs. Haskell, 3 Pick. 357.

(24) Merchants' Bank vs. Cook. 4 Pick. 414. 6 Com. 228

pany. Marshall, in the case of the Bank of the United States vs. Devereaux, 5 Cranch, 86, expressly says, a corporation is not a mere faculty, but a company of individuals, who, in transacting their joint business, may use a legal name. The same court, in Mass. which held that corporators were not parties to contracts made by the company, virtually reversed that decision, a few months afterwards, by holding them the real parties to actions brought upon such contracts. (25) How could they be parties to the action, without being parties to the contract upon which the action is founded?

But admit, for the sake of argument, that a corporation is an artificial being, whose acts are not the acts of the members composing the company. If there is any such being, it has been created by law, and can have only such powers and capacities as the law may give to it. It is well settled corporations may commit trespass. (26) Are we driven to the supposition that the law will give its creature the power of committing trespass, and then will punish it for the exercising of that power? Again, being the mere creature of law, it can do nothing unauthorized by law; it can adopt no instrument contrary to the charter of its creation; yet it has been held in Conn. that by practice, a corporation may become liable on an instrument executed in a different manner from that prescribed in the charter. (27) What can be more absurd than to say, a being which has only such powers as may be given to it by charter, may (by a continual doing of what it has no power to do,) adopt an instrument unauthorized by the law of its existence. If the promise of the corporation is not the promise of the members, but of some artificial being, upon forfeiture and dissolution, the debts to and from the company become extinguished. If this is law, any corporation which can manage to get a large amount of credit, may not only violate their charter with impunity, but it is the interest of the members so to do; by forcing the government to seize upon their franchises, all the

(25) Marry vs. Clarke, 17 Mass. 335.
(26) Angell & Ames on Corp. 250; 328 to 333.
(27) 2 Conn. 254.

debts which the company owes, becomes extinguished.—! Perhaps nothing could show more clearly the injustice of this extraordinary doctrine. Will the law punish a creditor by extinguishing his claims, because the debtor has violated his duty? Will it reward the debtor for the frauds which he has practised on his creditor? And that too, merely for the purpose of supporting the imaginary existence of an artificial, invisible, intangible being; existing only in contemplation of law; an unnecessary foolish fiction. If there is any one proposition in the law, which can be sustained by reason, and the analogies of law, it is, that whenever a corporation makes a contract, the corporators are the real contractors.

But it is contended, though the corporators are the real promisors, yet they promised in a particular capacity, and are liable in that capacity only; that they must be sued as a corporation, and when so sued, execution cannot go against them in their individual capacity; doubtless this was the origin of the doctrine against which we are now contending. Certain text writers finding no precedents where corporators have been sued in their individual names, have supposed that an action would not lie against them in that manner. Though perhaps there are no precedents of the kind, that is not a conclusive argument against the action. But with deference it is suggested, such a writ might be framed under the statute of Westminster 2nd; which expressly authorizes the issuing of new writs. Lord Pratt, in answering the objections of novelty, said, "he never wished to hear it urged again, for torts are infinitely various; they are not limited or confined; there is nothing in nature that may not be an instrument of mischief; and the special action on the case was introduced, because the law would not suffer an injury without furnishing a remedy." (28) We have the authority of Lord Kenyon, and Justice Ashurst, to the same effect. (29) The latter, in speaking of new cases which may arise, says, "that it would be just as competent for courts of justice to apply the acknowledged principles of law, to

(28) Willis Rep. 581.
(29) 1 East's Rep. 226. 3 T. R. 63. 1 Bing. 343.

any case which may arise two centuries hence, as it was two centuries ago." The fact of there being no private trading corporations until, comparatively, a modern day, readily accounts for the absence of early precedents, in favor of such writs. Municipal corporators being individually liable, when sued in a corporate name, there could be no object in suing them in any other manner.—But, when trading corporations were introduced, and it was found the common name was not a sufficient description of the corporators, to authorize the sheriff to seize upon their private property. Then, it is conceived, an action might be brought against them in their individual names, upon the principle already mentioned; that when the law recognizes a legal right, it will furnish a remedy. If they must be sued as a corporation, they may at any time deprive a creditor of his remedy, by causing the officers to resign, which would prevent the legal service of the writ; (for it will be remembered when writs issue in the corporate name, they are not served upon the individual corporators personally, but upon the officers.) (30) By preventing a service, they prevent a judgment. I am aware it may be said mandamus will lie to compel an election of officers; admit the creditor may sue out such a writ, (a proposition, by-the-by, which we conceive to be very doubtful,) still, if they should refuse to obey, it could only be enforced by issuing attachments against the particular members. If courts of law will, for the purpose of enforcing a creditor's remedy, take notice of the particular corporators under a mandamus, it is difficult to see why they might not as well take notice of them in the first instance, instead of driving the plaintiff to the expense and delay of suing out such writ.

But whether there is, or is not, any technical objections to making them liable in courts of law, there can be no such objections in courts of equity; where the proceedings are not so trammelled with forms and technicalities; where they at least profess to deal with each cause according to the actual facts of the case; accordingly we find

(30) M'Quin vs. Middletown, Man. Comp. 16 John. Rep. 6. Wood vs. Dummer, 3 Masons C. C. Rep. 308. 1 Tidds Prac. 116.

the highest court of equity has repeatedly (after the most mature deliberations,) held corporators responsible for the joint debts of the company—notwithstanding there was no joint funds. At an early day, this question upon two occasions came before the House of Lords, sitting as a court of equity. In both cases it was held, the members were individually responsible. In 1656, in the celebrated case of Dr Salmond vs. the Hamburg Company, (31) the question was raised before the High Court of Chancery. In that case, the bill was filed, and the company was served with process; but they would not appear, having nothing whereby they might be destrained; but divers particular members being served in their natural capacity, did appear and demur; alleging they were not liable in that capacity. In 1666 the demurer was allowed, and the bill was dismissed as to them; therefore a petition of appeal was presented to the House of Lords, alleging that in such cases the House of Lords had given special directions to relieve. In support of which allegation, they cited the two cases before referred to. The particular persons named, put in plea, answer, and demurer; the company, as a company refused to appear. Upon the argument of the case, in 1670, the lords ordered the Chancellor to retain the bill, and give relief to the plaintiff, according to his prayer. In conformity with this order, a decree was entered by the lord keeper, in 1671. The above decisions forms a weight of authority in favor of corporators' resposibility, which is not easily shaken. In America this question appears not to have been raised for many years. The earliest instance that I have been able to find, where an American court of equity was called upon to decide this question, was the case of Hume vs. Wenyan & Wando Canal Company; (32) which arose in South Carolina, about the year 1825—the Chancellor of that state, upon the authority of Dr. Salmonds' case, sustained the bill. An appeal was taken from the Chancery to the Court of Errors, and there the Chancellor's decree was

(31) 1 Chan. Ca. 204.

(32) South Carolina Law Journal, Vol. 1, page 217; 4 Vol. Am. Law Mag. 92.

affirmed. The question was again raised, in Conn., (33) about the year 1844; where, (I believe for the first and only time, since the decision made by the House of Lords,) a court of equity held the corporators were not individually responsible. This opinion appears to have been delivered without much investigation. The court advance no reason in support of their position. They cite no authority, though they profess to base their opinion upon established doctrine. They say "they must take the law as they find it, and that neither in this country nor in England, has it been supposed that corporators were liable. On the contrary, a different doctrine has every where been established." Now, with deference to the opinion of that court, I would simply state, that after quite a thorough search through two or three large libraries, I have not been able to find a single case which sustains their position. On the contrary, up to the time when the opinion was delivered in Conn., in every instance, where a bill had been filed in courts of equity, relief had been granted. It was impossible for the court to have investigated the authorities, without discovering their broad assertion was utterly unfounded. Such an opinion cannot have weight sufficient to overturn the previously well settled doctrines of the law. But it is said the corporators have pledged the capital stock for the payment of the joint debts. The creditors have agreed to look to the capital stock, and that alone; therefore they have no right to look to other property.—The charter says nothing about the capital stock being a pledge. The contracts between a corporation and its creditors, contains no clause expressly limiting the liability of corporators to the amount of capital stock; no evidence that the creditors have agreed to trust to that security alone. If the property is a pledge; if there is any such agreement, it must be mere implication of law, arising out of the nature of the case. Where property is pledged to creditors, it is generally understood that they have a power over it, and that it is placed in such a position that the debtor cannot lessen the security. Is the property here claimed to be a pledge so situated? Most

[33] Jewet vs. Thomas Bank, 16 Conn. 511; 16 Conn. 368.

clearly it is not. The creditor has no power over it. The stockholders have both possession and control. They may sell or dispose of it at pleasure; or, they may create new debts, and thus lessen his interest in the supposed security; subsequent creditors having equal claims upon corporate property with prior ones, they, the corporators may contract with the corporation. They may acquire a specific lien upon any, or all of the corporate property, and if it is not more than sufficient to satisfy such claim, the other creditors can have no share in it, though they were prior creditors. Such a power to postpone prior creditors, in favor of their own claims, is utterly inconsistent with the doctrine, that corporate property is a pledge to secure them. The restrictions, limitations, and conditions contained in charters, afford creditors no security. It places no restraint upon the corporators' power of settling or disposing of their property. It gives the creditor no power over the property, either directly or indirectly. They have no means of knowing when the charter is violated, the corporation books being private books, which they cannot inspect without the consent of the corporators. (34) But even if they should happen to discover that the corporation had violated their charter, that, in general, would furnish no relief. They could not take advantage of such violation; it being well settled that none but government can take advantage of the breach of corporate privileges. (35) Neither the joint property, or (what is about the same thing, both being of equal value,) the capital stock, is a pledge to creditors. Look at the number of broken institutions and see with what safety creditors may trust such a pledge. A number of persons get the privilege of holding and managing a common property under a common name.—They pay into a common fund $100,000, and call it a Bank, with a capital stock of $100,000. They commence operations by striking of notes in the common name, to the amount of $300,000—privately divide $200,000 of such

[34] Utica Bank vs. Hilliard, 5 Cowen 419; 6 Cowen 62; 2 Starkie on Ev. 734; 8 T. R. 590.

[35] Angell & Ames, on Corporations, 664.

notes among the stockholders, who in turn make notes to an equal amount, payable to the company. With the other $100,000, they do what appear to be a safe banking business, at least it is so managed as to avoid suspicion. In the mean time, it is published far and wide, that such and such a bank has gone into operation, with a capital stock of a hundred thousand dollars, and what is more and better, the full amount has been paid into the vaults of the bank. The officers certify under oath to the truth of the statement. The stockholders send their agents all over the country, peddling out the notes which they have received in exchange for their own notes. Every artifice is used to get them into circulation. The public, though often deceived, are ever credulous. Well, after the stockholders have gotten as many bank notes in circulation as they can, by a continual puffing through the newspapers, brokers, and other bank agents, their next business is to ruin the credit of the notes. Every cent which they can shave the bank notes is so much transferred from the pockets of the holder, into their own private coffers. It being the interest of those who control the institution, to ruin its credit, of course they succeed. They may employ the same agents in discrediting the notes, which they had employed to give them circulation. They may circulate exagerated statements concerning the solvency of the institution. They may borrow notes of the company and with them draw all the available means out of the common treasury. There are a hundred ways in which they may accomplish their ends. What can the poor bill holder do? He cannot pass the bills as currency, they no longer being convertible into specie. No one except stockholders and debtors to the company wish to purchase the notes, as no one else can tell whether they will be worth anything to him, or not; the books and transactions of the institution being private—not to be inspected but by the interested few. The creditor cannot collect his note without a law suit; which he is not willing to undertake, having but a small amount of notes. He is almost forced to accept whatever the bankers may choose to give him. Thus the innocent (and it may

be poor,) holder of the note is shamefully robbed of the value which he gave for it, by the avaricious and dishonest banker. If the individual corporators are not responsible for the notes, there is no means of preventing this legal robbery. Talk about the securities provided in the charter, when it is well known a creditor has no means of knowing when it is violated; and if he should find it out, he could not take advantage of it. Talk about the capital stock being a security pledged to the creditors, when it is completely within the control of the debtors; when creditors can know nothing about the affairs of the company, except what the debtors may choose to tell them.

But we are told by Chief Justice Parker, that stockholders are not individually liable, "as that would lead to the most palpable injustice. A stockholder wholly innocent and ignorant of the mismanagement which has brought the bank into discredit, might be ruined by owning a single share in the stock of the corporation." That that judge may have the benefit of his consistency, I will extract a part of an opinion, delivered by the same judge a few months afterwards. In the case of Marcy vs. Clark, he says, "the legislature has acted wisely in making members of manufacturing corporations liable for the debts of the company. By this, in fact, they only continue the principles of co-partnership in operation; and, considering the multitude of corporations, which the increasing spirit of manufacturing gives rise to, regard to the interest of the community seems to require, that the individuals whose property, thus put into a common mass, enables them to obtain credit universally, should not shelter themselves from a responsibility, to which they would be liable as members of a private company." However distinguished that judge may have been, he was peculiarly unfortunate in the opinions which he delivered in the above cases. In one, he says, corporators are not parties to corporate contracts; because individual responsibility is palpably unjust. In the other, he says corporators are parties to suits brought upon such contracts; and that it is wise to make them individually responsible. Leaving others to reconcile the two opinions if they can.

I proceed to remark, that there is an unnecessary amount of sympathy spent upon the imaginary results, which would follow if corporators were responsible. Persons make it the interest of the stockholders to ruin the credit of the company, by limiting the responsibility of its members, and then in contemplation of the number of broken institutions, weep over the hardships which particular stockholders would undergo, if they had to pay all the joint debts. It is not right to look upon the number of broken institutions which now exist, and from that view alone contemplate the hardships which individual responsibility would impose upon some of the members. It should be remembered most of the worthless companies were made bankrupt by persons who became wealthy by means of the companies' insolvency; who now luxuriate in their ill gotten gains. They broke the companies intentionally, supposing they would not be responsible for the joint debts. The few innocent stockholders, (if there are any such,) could have prevented the fraud, if they had exerted themselves. But they too supposed they would only lose what little capital stock they might have placed in the concern. The consequence was that the only persons who could detect or check the fraud, were either directly engaged in it, or cared too little about the institution to turn his attention that way. It is high time such persons were taught the law will not suffer them to permit other persons to use their names, and means, in defrauding the community; they not using the means which the law has given them of preventing the fraud. If such men had not supposed the law would sanction iniquity and fraud, there would have been but few broken institutions, and still fewer instances where stockholders would have to pay an undue proportion of the joint debts. The capital stock, and by-laws, being a complete security to those who had every facility of taking advantage of them.

The general principles upon which partners are held responsible, apply with full force to corporators. If partners should have granted to them the privilege of holding, conveying and defending their joint property in a common name, it has been seen the partnership would

be transformed into a corporation. They could make by-laws for the government of the joint property; which would go in succession, upon principles already explained. In short, they would have all the ingredients of a corporation. But there is nothing in the privileges granted to the partners for their convenience, which can alter the nature of their obligations.

It has been said, partnerships, in general, have the benefit of all the floating capital belonging to the partners.—Corporations do not. Admit the truth of the position; and what earthly difference can that make in their responsibility? If such an argument proves anything, it proves that partnerships, which do not have the benefit of this capital, should not be responsible, and corporations which do have the benefit of it, should be responsible. Such a distinction would be scouted by every lawyer as utterly unsound. No one can fail to see, the extent of a person's liability should not be determined upon any such principles.

Again it is said, the principle object of a partnership, generally, is to give the company the united credit of all the partners, which is not the case with corporations. The difference here claimed, has no real foundation. Both corporators and partners wish to get a united credit. In many instances, neither corporators nor partners, wish to get a credit to the full amount of all their property; and in many other cases they wish to extend their credit as much as they can. Corporators are quite as anxious to extend their joint credit as partners. But admitting there is such a difference, it ought not to effect the extent of their reponsibility. Their obligation upon any given debt, cannot be determined by the amount of credit, which they may have asked for and obtained.

Again, corporators intrust the joint business to directors, who manage all the business, and that ought to limit their responsibility. As this is one of the main arguments urged by corporators. It will be well to examine it; and first it will be observed, that this argument has not had weight sufficient, in the case of silent partners, to convince courts of justice. There has been a number of ca-

ses where unincorporated companies have been organized and managed in precisely the same way in which corporations are organized, and managed. Yet, in all of the cases, it has been held the members were responsible to the full amount of the debts. (36) At first view we are apt to think such decisions harsh and severe—that they are extending the responsibility of partners beyond the reason upon which the law is based. But upon a close and candid view of the case, I think it will be found not to be an extension of the rule. At common law, each and every one of the members of a firm, is an agent for each and all of the other members; so that any one may enter into contracts, binding upon all. Suppose ten persons should form a partnership,—tmmediately each and every one of the ten becomes an agent for each one, and all, of the other nine. But suppose instead of making each member an agent, they, by the articles of association, were to appoint five of their number to manage their business; three of whom must concur in every contract, previous to its consummation,—would such an arrangement increase the risk of the other partners? Would the requiring three of the members to concur in every contract, make the risk greater than it would be, if every member might make contracts, binding upon the firm, at pleasure? Certainly the risk is diminished; just in proportion as it is less likely to find three men in ten who will concur in the same error and fraud, that it is to find one man in ten who will commit errors or cheat, and it will be difficult to show a diminished risk ought to diminish their liability. Though, by the articles of association, the partners who are not directors cannot bind the firm; that cannot increase their risk. If A and B each have the power of making contracts, binding upon both, the taking away the power from A, will not increase the risk which he would incur, from the mismanagement of B. Each and every restriction put upon the general power of partners, diminishes the risk which each of the other partners incur. Such restrictions are made for the benefit of the partners. So in the case of corporators; the

(36) Hess vs. Werts, 4 Ser. & Raw. 356.

taking away of the general power of partners from each corporator, and they appointing some of their number managers of the joint business, really lessens the risk of each one of the corporators. The restrictions and rules prescribed by charters, are made for the benefit of corporators. With the exercise of ordinary prudence, they are a complete security to them, against any extraordinary loss.

The limitations, restrictions, and powers conferred by charter, are derived from the same sources, and rest upon the same legal foundations; with limitations, restrictions, and powers conferred by unincorporated companies. In either case, they derive all their force from the assent of the corporators or partners. In both cases, they are intended to protect the members from the risks which they would be subject to, if each person was a general agent. Of those who think the powers of directors, in chartered companies, have a different source from the directors of other companies, I would ask, whence comes the greater power? Are not the directors in both cases, the agents of the members; deriving all their authority from the agreement or assent of them? In the celebrated case of Dartmouth College vs. Woodward, it was held, a charter of incorporation was a contract. If a contract, the limitations, restrictions, and powers conferred by it, must derive their force from the assent of the parties contracting. Each individual, when he becomes a member, gives his assent to each one, and all, of the restrictions contained in the charter. No man can be made a member of a private company without his assent. The fact of the king being a party to the contract, adds no sanction to its validity. He has no more power to bind individual property, than any other person. Strangers are not bound by by-laws, though authorised by him, they not having consented to them.

It is said corporators have a greater number of members, and they generally have a smaller interest in the company than partners do. This argument cannot apply to corporations, as corporations—many bodies of that kind having but few members. On the other hand, partner-

ships often consist of a large number of persons, If the objection amounts to anything, it is merely, that the same rules which are applicable to small companies, should not be extended to larger ones. If corporations, generally, have more members than partnerships, the corporators, as a general rule, have greater securities in the capital stock, and restrictions prescribed by the charter. The greater the number of corporators, the less danger there is of any one corporator having to pay an extraordinary sum; as it is altogether probable a given loss will fall more lightly upon a company of a hundred than it would upon one of fifty members.

It is said the severity of partnership laws have been acknowledged by nearly all commercial countries; they having established limited partnerships. Admitting the policy of establishing such partnerships, the propriety of which has been questioned by many of the most able and learned men. Admit it is wise and proper to establish rules of partnership law; so that noble and wealthy families may enjoy the advantages of trade, without risking their dangers. Still there is such a wide difference between such limited partnerships as have been established, and corporations, that an argument cannot be drawn from one, to show the limited responsibility of the other. In limited partnerships, the special partner places his portion of the common fund, entirely in the control of the general partners, whose skill and integrity is always applied to the management of the concern; who is always responsible for the whole amount of debts contracted. He therefore finds it his interest to conduct the business with the utmost skill and care; his interest is indentified with the interest of the partnership. On the contrary, corporators retain a control over the joint funds. By selling out their stock, and changing their officers, the skill and integrity employed, is completely changed, without the creditors consent. If the corporators are not individually responsible, they are not urged by self interest, to conduct the affairs of the company with skill and care. On the contrary, they embark in the most wild and imprudent speculations, well knowing all the profits is their gain and

the losses, beyond a small amount, must be borne by the creditors. It is their interest to keep up a kind of trading with the joint funds, and thereby, in case of misfortune, transferring the stock originally paid into the common fund, back into their private pockets, leaving nothing to satisfy their obligations. Although a person might be willing to trust a man with a given capital, whose skill and integrity he might be well acquainted with; it is hardly probable any one would be willing to trust entirely to a fund in the hands of the debtor—the debtor having the privilege of carrying on a trade between himself and the funds; he having the power of transferring to whomsoever he might please, the power which he had over the fund pledged; as is the case with corporators, if not individually responsible. Persons are not generally so willing to trust their only security to the hands of any one upon whom it may chance to fall.

Such as contend the capital stock, and the restrictions in the charter, are a sufficient security for creditors, have no right to complain of the law, as harsh and severe, because it makes stockholders liable. If they are a sufficient security for creditors, they are a still more ample security for corporators. The one has no means of knowing how much capital has been paid into the common stock,—the other may. (37) The one cannot tell how much of the capital stock has been withdrawn, in the shape of loans to the stockholders; the other may. The one can know nothing about the various hazardous enterprizes which the company is engaged in; nor the general method in which the business is conducted; the other may. The one cannot hold the directors responsible for their mismanagement; the others can, they being their agents. (38) The one can take no advantage of the breach of the charter; the other may. The one has no control over the management of the concern; the other has. Besides, by limiting the responsibility of stockholders, you first give them the power, and then make it their

(37) 12 Wend. 183.

(38) Franklin Ins. Comp. vs. Jenkins, 2 Wend. 130. Robinson vs. Smith, 3 Paige Ch. Rep. 233.

interest to cheat the creditor, by ruining the credit of the institution, and then buying up its notes at a discount. Who cannot see that it is much less severe to hold the stockholders, with all their advantages, responsible for the manner in which the joint business is conducted, than it is, to make the creditor lose his claims, if it is badly managed. Or, what is about the same thing, make the creditor responsible for the management of the joint funds, without giving him the least possible control over it.

In the recent case of the Bank of the United Staies vs. Primrose, the very important question came before the Supreme Court of the United States, whether by the comity of nations, and between the states, a corporation created by one state, would be permitted to make contracts in another state? The Chief Justice, in delivering the opinion of the Court, remarks, "that there is nothing in the nature and character of corporations, which should extend to it the comity of suit, and refuse to it the comity of contract." If we consider a corporation as a number of individuals transacting their joint business, individually responsible for their joint acts; there is no reason why they should, by the comity of nations, have the right to sue and not have the right to contract. But if the corporators are not the real contractors; if they are not individually responsible for the contracts of the company; there is sufficient reason why the comity of nations should not extend to them the right of contracting in a foreign state. We cannot suppose the learned Chief Justice would tell us in one page, that the law of the place where the contract is made, and is to be executed, is the law of the contract; and in the next page tell us, corporations may make contracts in foreign states, unless he understood corporators were personally bound for such engagements. He could not have supposed the law of Penn., under which the corporation was organized, could govern a contract made, and to be executed in Alabama. He did not think the courtesy of nations would force the citizens of one state, to seek shelter and protection under the laws of a foreign state; force them to go into a foreign state for the interpretation of a contract, made and

to be executed at home. He must have considered the corporators the real contractors, individually responsible ; at least, for contracts made in another state than that of its organization. And if they are individually responsible, by common law, for contracts made out of the state, why not responsible for contracts made in the state? If from the nature of corporations, the members are not responsible for their joint contracts, then we have those extraordinary partnerships; partnerships which are managed and controlled by persons whose interest it is to manage them fraudulently; partnerships, where the members may at any moment, force the creditors to look to other and different persons for the satisfaction of their claims. We not only have such partnerships introduced, by our own State granting such privileges to private individuals; but we have them introduced by courtesy, by implication, and also by the Congress of the U. S. Before adopting such conclusions, let us pause and briefly consider the consequences which will follow such premises. When the Supreme Court of the United States told us it was one of the incidental powers of Congress, to create a United States Bank, (39) they told us Congress had power to permit a company of persons to hold lands in a common or fictitious name; notwithstanding the laws of the State where the land might lie, were to the contrary. That Congress might alter the method of conveying interests in real estate; notwithstanding the law of the State. That they might authorise companies of persons to make and execute deeds in a common name; signing and sealing them in a different manner from that required by the State laws. That they might alter the law of descent—permitting real estate to go in succession, instead of descending to heirs according to the law of the State. That they might give companies of persons the privilege of appearing in courts as a body, contrary to the common law. An extension of the power of Congress, sufficient, one might have supposed, to satisfy almost any latitudinarian; yet we find those who are still anxious to extend the implied powers of Congress. Who, as if anxious to sweep away

(39) McCulloch vs. State of Maryland, 4 Wheaton 421.

the last vestige State independence, would give Congress the power of interfering with the law of partnerships; would have them establish limited partnerships of the most odious kind; would have them intefere with process, which State courts issue, to enforce an appearance of parties; and in the method of enforcing their judgments. If the State legislature have not power to legislate for such objects, over what have they the power? If Congress have the power of creating corporations, the corporators must be individually responsible; else nearly every vestige of State government may be swept away like cobwebs, before the edicts of Congress, and the General government is a consolidated government; which either under express, or implied powers, may swallow up every other branch of the government.

ERRATTA:—Fifth line from the bottom, of the ninth page, a portion of the line is upside down, which was not discovered until worked off.

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